IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 03-647

THE STATE OF MONTANA,

Plaintiff and Respondent,

v.

LEVI DANIELS,

Defendant and Appellant.

APPELLANT'S BRIEF

ON APPEAL FROM THE MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY, HONORABLE C. B. McNEIL, PRESIDING

APPEARANCES

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I. STATEMENT OF THE ISSUES

A. The district court lacked jurisdiction to proceed over Levi's case because Levi never expressly waived his right to a transfer hearing.

B. The district court did not have statutory authority to impose an additional twenty-five-year suspended sentence onto Levi's sentence.

II. STATEMENT OF THE CASE

Levi Daniels appeals from the denial of the claims in his Second Amended Petition for Postconviction Relief, and from the sentence entered against him in the court's Amended Judgment and Commitment.

III. STATEMENT OF THE FACTS

On March 11, 1999, the state arrested Levi Daniels and charged him with deliberate homicide and several other felony counts, alleged to have been committed on November 21, 1998. Levi was fifteen years old at the time of the homicide and his arrest. The court appointed Benjamin Anciaux as counsel for Levi, and arraigned Levi on the charges on March 17, 1999. On March 18, 1999, Levi turned sixteen-years-old.

The state filed a request for a transfer hearing for the court to determine whether the charges against Levi could be removed from youth court into district court. Before the court could remove Levi's case from youth court into district court, the court had to find that: 1) probable cause existed to believe that Levi had

committed the homicide, and 2) considering the seriousness of the offense, whether it was in the interests of community protection for the case to be filed in district court. The court set a transfer hearing for May 12, 1999.

On May 12, 1999, Anciaux waived Levi's right to a transfer hearing and stipulated that sufficient evidence existed for the court to find that Levi's case should be filed in district court. During the time set for the hearing, the state dominated the conversation and told the court that probable cause had already been met, and that the basis of the hearing had been to determine the seriousness of the offense and whether the interest of the community justified the transfer of Levi's case into district court. 5/12/99 Tr. pp. 3-4. The prosecutor then told the court that:

> Ms. Christopher: It's my understanding, in conversation with defense counsel, that, rather than go through that hearing, the defendant would be stipulating that the Court could make those findings.

Anciaux's only response was, "That's correct, your Honor." The court replied, "so ordered." No further discussion between the parties occurred regarding Levi's right to a hearing to keep his case from being removed from youth into adult district court. 5/12/99 Tr. p. 4. (A copy of the 5/12/99 hearing transcript is attached as Exhibit A).

Although Levi was present during this proceeding, the court never addressed or spoke with Levi. Therefore, the court never obtained an on-the-record personal waiver from Levi. Nor did the court address Levi's mother or ensure from Anciaux

that Levi understood the proceedings, and understood the rights that he would be waiving. DC 19, 48. Further, besides the lack of any on-the-record oral waiver of the transfer hearing, Levi had not signed any written waivers or stipulations. DC 19, 48.

On September 1, 1999, Levi entered into a plea agreement in which he pleaded guilty to burglary and criminal mischief and entered an Alford[1] plea to deliberate homicide by accountability.

On October 20, 1999, the court sentenced Levi to the Department of Corrections for a period of fifteen years for Count I (burglary), forty years for Count III (deliberate homicide by accountability), and ten years for Count V (felony criminal mischief). The court ordered the sentences to run concurrently, for a total of forty years to the Department of Corrections. (A copy of the Judgment is attached to this brief as Exhibit B). Levi filed a pro se petition for postconviction relief on March 8, 2002. The court appointed the Montana Appellate Defender Office to represent Levi and ordered that the state respond. The state filed a response to Levi's pro se petition on April 22, 2002[2]. DC 47.

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[1] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 160 (1970).

[2] The state titled its Response as "State's Response to Petitioner's Amended Petition for Postconviction Relief." DC 47. However, at that point, the only filing had been Levi's *pro se* petition and no amended petition had yet been filed.

On September 13, 2002, through counsel, Levi filed an Amended Petition for Postconviction Relief and Memorandum in Support of Amended Petition for Postconviction Relief. Levi argued that the district court lacked subject matter jurisdiction to proceed over his case because Levi did not personally stipulate to or waive his right to a transfer hearing. DC 50, 51. On October 31, 2002, the state filed a response to Levi's amended petition. DC 52.

Levi, on December 5, 2002, filed a Motion for Leave to File a Second Amended Petition for Postconviction Relief and supporting brief. The state did not object to this motion. DC 53, 54. After the court granted leave, on December 6, 2002, Levi filed his Second Amended Petition for Postconviction Relief and supporting memorandum. DC 56, 57. Levi asserted an additional claim that the court did not have statutory authority to sentence him beyond five years to the Department of Corrections. DC 53, 56, 57.

The state filed a response on February 10, 2003. DC 62. The state conceded that Levi's second claim "was correct and the Petitioner could not be sentenced to more than five years to the Department of Corrections on each count." However, the state argued that at Levi's re-sentencing, the court could sentence Levi to five years, consecutive, for each count – for a total sentence of fifteen years. The state argued, "[w]hile a sentencing court may not impose a sentence without statutory

authority, see State v. Horton,[3] under the law at the time of this offense, the court was statutorily authorized to sentence the Defendant to the Department of Corrections for five years on each count." The state relied upon its previous response with regard to the other issue raised by Levi. DC 62, 65.

On April 28, 2003, the court issued Findings of Fact, Conclusion of Law and Order. With regard to Levi's first claim, the court denied Levi's request to vacate his conviction and set the matter for a transfer hearing. However, the court did find that Levi's sentence "exceeds the maximum punishment allowed by law at the time the Defendant was sentenced." (A copy of the court's Findings of Fact, Conclusion of Law and Order is attached to this brief as Exhibit C). Therefore, the court vacated its previous sentence and set a new sentencing hearing date. DC 66.

The court conducted a re-sentencing hearing on June 25, 2003. At the time of the re-sentencing hearing, Levi was only twenty-years-old and had already spent a majority of his formative years in prison. 6/25/03 Tr. p. 9. Levi's attorney argued for a sentence which would provide rehabilitation as well as punishment. 6/25/03 Tr. pp. 11-12. Rejecting defense counsel's arguments, the court sentenced Levi to the Department of Correction for a period of five years for Count I (burglary), for a period of five years to the Department of Correction "plus 25 years suspended" for

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[3] State v. Horton, 2001 MT 100, 305 Mont. 242, 26 P. 3d 886.

Count III (deliberate homicide by accountability) and five years to the Department of Corrections on Count V (felony criminal mischief). The court ordered the sentences to run consecutive to each other, "for a total commitment in the Department of Corrections of 15 years, plus a total of 25 years suspended." 6/25/03 Tr. p. 13.

Levi immediately filed a Notice of Appeal, appealing his sentence and the court's denial of the other claim raised in his second amended petition for postconviction relief. The court issued its written Amended Judgment and Commitment on July 3, 2003, which included the twenty-five years of suspended time. DC 75. (A copy of the Amended Judgment and Commitment is attached to this brief as Exhibit D). Subsequent to the sentencing hearing, but before the court had issued its written judgement, Levi also filed a motion to amend sentence, in which he argued that the court lacked statutory authority to impose the suspended twenty-five years. DC 74. The court, by implication, denied the motion to amend sentence because the court never issued a ruling on Levi's motion to amend sentence.[4]

IV. SUMMARY OF ARGUMENT

Sixteen-year-old Levi Daniels never personally waived his right to a transfer hearing. Whether a youth must personally waive his right to a transfer hearing is an

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[4] On July 2, 2003, Levi filed a Amended Motion to Amend Sentence. The only difference in the amended motion was that Levi substituted "Count III" wherever "Count II" was erroneously written in the previous motion. DC 76.

issue of first impression for this Court. However, as Levi argued, in accordance with holding in other jurisdictions, the district court never properly transferred his case from youth court to district court because Levi never personally waived his right to a transfer hearing. Thus, the district court never obtained subject matter jurisdiction over Levi, and all of the district court proceedings in Levi's case were null and void.

Notwithstanding the jurisdictional youth court argument, the court imposed an illegal sentence at Levi's re-sentencing hearing. The maximum sentence Levi could receive to the Department of Corrections, for each count, was five years. Therefore, the court's suspended sentence of 25 years on Count III was an illegal sentence.

V. ARGUMENT

A. The district court lacked jurisdiction to proceed over Levi's case because Levi never expressly waived his right to a transfer hearing.

1. Jurisdiction was never properly removed from youth court into district court.

Pursuant to § 41-5-206(4), MCA (1997), youth court retains jurisdiction over juveniles until the case is properly transferred into district court. Therefore, if Levi's transfer hearing was improper, the district court never obtained subject matter jurisdiction over Levi. This Court has held that an issue involving subject matter jurisdiction may be raised by a party, or by the court, **at any stage of the proceedings**. State v. Giddings, 2001 MT 76, ¶15, 305 Mont. 74, ¶15, 29 P. 3d 475,

¶15 *citing* State v. Tweedy, 277 Mont. 313, 315, 922 P. 2d 1134, 1135 (1996)(*citing* In re Marriage of Miller, 259 Mont. 424, 427, 856 P. 2d 1378, 1380 (1993)); See also, In re Marriage of Skillen, 1998 MT 43, ¶10, 287 Mont. 399, ¶10, 956 P. 2d 1, ¶10.

Moreover, Levi's subsequent guilty plea cannot be considered a waiver. In State v. Meeks, 2002 MT 246, ¶19, 312 Mont. 126, ¶19, 58 P. 3d 167, ¶19, this Court held that jurisdictional claims are not waived by a plea of guilty. The state charged Meeks with several offenses, and initially Meeks was declared unfit to proceed and committed to the Department of Health and Human Services. Meeks, ¶1. The court later deemed Meeks fit to proceed, and he pled guilty to the charges. Id. On appeal, Meeks argued that his convictions were invalid because the state had failed to comply with the mental health commitment statutes. Meeks, ¶18. The state argued that when Meeks pleaded guilty, he waived his right to challenge his convictions. Meeks, ¶ 17. This Court rejected this argument and concluded that since Meeks's claim was jurisdictional in nature, it could not be waived by his guilty plea. Meeks, ¶ 19. Just as this Court concluded in Meeks, here Levi's jurisdictional claim cannot be considered waived by his subsequent guilty plea.

Although an issue of first impression in Montana, other jurisdictions have specifically held that if a defendant's case is improperly transferred from youth court

into district court, the district court never obtains jurisdiction over the proceedings. In State v. Grenz, 243 N.W. 2d 375, 377 (N.D. 1976), the district court transferred the youth's case from juvenile to district court prior to appointing an attorney for the youth, and without sufficient notice to the youth's parents. The youth ultimately pled guilty in district court and subsequently petitioned for postconviction relief. Id. The Supreme Court of North Dakota held that because the waiver hearing was "ineffectual to transfer jurisdiction" then the subsequent criminal proceedings in district court were "were null and void for lack of jurisdiction over of the person of Timothy Grenz or the subject matter of the case." Id. See also, Johnson v. State, 551 S. W. 2d 379 (Tex. Crim. App. 1977)(Where juvenile was never properly served with any process in juvenile court, order waiving jurisdiction was a nullity, and thus district court did not have jurisdiction to try juvenile for criminal offense).

Here, just as in Grenz, Levi's claim involves an issue of subject matter jurisdiction. Levi has argued that the district court never had subject matter jurisdiction over his case, because he never stipulated to a waiver of his youth court transfer hearing. If the district court never had subject matter jurisdiction over Levi's case, the proceedings in district court were null and void. Thus, the time limits set forth in the postconviction statute, § 46-21-101, MCA, *et. al.*, cannot be considered as a procedural bar to Levi's claims.

2. The transfer of a case from youth court to district court is a critical stage in the proceedings.

Both the United States Supreme Court and this Court have held that a juvenile's transfer hearing is of critical importance. In Kent v. United States, 383 U.S. 541, 561, 86 S. Ct. 1045, 1057, 16 L. Ed. 2d 84 (1966), the United States Supreme Court held that the district court violated the juvenile's due process protections when it transferred the defendant from juvenile court into district court without a hearing, and without specific findings being made by the juvenile court. The Court explained that the decision to transfer a juvenile's case into district court was potentially as important as the difference between five years' confinement and a death sentence. 483 U.S. at 557. Thus, the Court found that it was "clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile." 383 U.S. at 556.

Likewise, this Court has held that a transfer of a juvenile from youth court to district court is "critically important." In re Stevenson, 167 Mont. 220, 229, 538 P. 2d 5, 10 (1975) *citing* Black v. United States, 355 F. 2d 104 (D.C. 1965) and, State v. Butler, 1999 MT 70, ¶ 26, 294 Mont. 17, ¶ 26, 977 P. 2d 1000, ¶ 26 *citing* Kent, 383 U.S. at 556. In Stevenson, this Court held that the evidence presented at a transfer hearing of a youth charged with robbery and aggravated assault was insufficient. 167

Mont. at 228, 538 P. 2d at 9. The Court explained that the waiver of jurisdiction is the most severe sanction that can be imposed by the juvenile court. 167 Mont. at 230, 538 P. 2d at 10 *citing* Thomas Schornhorst, The Waiver of Juvenile Court Jurisdiction: Kent Revisited, 43 Ind. Law Journal 583, 586.

In Butler, this Court followed Kent, and held that, in Montana, a hearing is required before a district court can retain jurisdiction over a juvenile. Butler, ¶ 32. This Court explained, "The court's decision in this regard is as potentially important to a youth as the difference between being detained until he is 25 years of age if the case is processed in youth court, and losing his life if the case is processed in district court." Butler, ¶ 26. Similar to the defendants in Kent and Butler, the court's transfer of Levi's case from youth court to district court was of "critical importance" since it meant the difference between placement in a youth correctional facility or a life in prison.

3. The court lacked jurisdiction to transfer Levi's case from youth court into district court, without a personal waiver by Levi.

This Court has held that fundamental rights cannot be merely waived by a defendant's attorney. State v. Finley, 2003 MT 239, ¶33, 317 Mont. 268, ¶33, 77 P. 3d 525, ¶33 *citing* State v. Tapson, 2001 MT 292, ¶38, 307 Mont. 428, ¶38, 41 P. 3d 305, ¶38. In Finley, the trial court accepted defense counsel's representation that the

defendant desired to waive his right to his revocation. Finley, ¶34. The Court did nothing to ascertain that the defendant understood the consequences of waiving the hearing nor did the court inform the defendant of the rights available to him. Id. This Court held that the district court committed reversible error by accepting the representation of defense counsel without engaging in a colloquy with the defendant. Finley, ¶35.

This Court in Finley explained that it "will not engage in presumptions of waiver; any waiver of one's constitutional rights must be made specifically, voluntarily, and knowingly." Finley, ¶32 *citing* State v. Bird, 2001 MT 2, ¶35, 308 Mont. 75, ¶35, 43 P. 3d 266, ¶35 (*citing* Park v. Sixth Jud. Dist. Court, 1998 MT 164, ¶36, 289 Mont. 367, ¶36, 961 P. 2d 1267, ¶36). Thus, a defendant's attorney cannot waive a defendant's fundamental rights as a matter of convenience. Finley, ¶33 *citing* Tapson, ¶38 (Court must obtain an on-the-record personal waiver by the defendant acknowledging that the defendant voluntarily, intelligently and knowingly waives his right to be present for any conversations with the judge and jury). Therefore, before accepting a waiver of rights, a court must ascertain on the record that the criminal defendant has been apprized of his rights, understands what rights he is waiving and waives those rights voluntarily. Id. *citing* Tapson, ¶27.

Additionally, the Montana Constitution specifically provides that juveniles are

entitled to the same fundamental rights as adults. In the Matter of S.L.M., 287 Mont. 23, 34, 951 P.2d 1365, 1372 (1997)(Holding that the Extended Jurisdiction Prosecution Act violated the equal protection clause and juvenile rights clause of the Montana Constitution because the EJPA treated youth offenders more harshly than their adult counterparts). The Montana Constitution provides that "[t]he rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which *enhance* the protection of such persons." S.L.M., 287 Mont. at 38, 951 P. 2d at 1375 *citing* Mont. Const. Art. II. §15 (Emphasis in original). This Court explained, "[i]n light of this clear constitutional guarantee, a juvenile enjoys all rights and privileges of an adult unless the law at issue affords *more*, not less, protection to the juvenile." S.L.M., 287 Mont. at 39, 951 P. 2d at 1375 (Emphasis in original).

Logically, if an adult defendant has a fundamental right ensuring that his probation revocation hearing cannot be waived merely by his attorney, Levi, likewise, was entitled to the same protections at his transfer hearing. Just as in Finley, here the district court did not even address Levi, or give Levi an opportunity to address the court. Instead the prosecutor dominated the hearing, and Levi's attorney merely uttered an affirmative response to the prosecutor's summary.

Other jurisdictions have held that a juvenile transfer hearing cannot be casually

waived by the youth's attorney. In Haziel v. United States, 404 F. 2d 1275, 1278 (D.C. 1968), the youth's attorney waived the transfer hearing from juvenile court to district court, without any showing that the youth had been consulted regarding the waiver of the hearing. The Court compared the waiver of a transfer hearing to that of a guilty plea. Id. The Court expounded that "[i]t would invert justice to allow the importance of the roles entrusted to court and counsel to justify a complete denial of participation to the juvenile." Id. at 1281. Similarly, here the record is void of any indication that Levi's trial counsel consulted with either Levi or his mother regarding the importance of the transfer hearing and whether Levi was in agreement with waving the hearing.

In In re K.W.S., 521 S.W. 2d 890, 892 (Tex. 1975), the state filed a defective summons seeking waiver of youth jurisdiction into district court. The youth's attorney waived the defect, thus allowing the case to be brought in district court. Id. at 893. Nothing in the record existed to indicate that the youth was informed of and understood the right and possible consequences of waiving the defect. Id. at 894. On appeal, the Court reversed and explained that the attorney had no authority to make the waiver alone. Id. The court held that a waiver by the youth could not be presumed by the silent record. Id. *citing* Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711, 23 L. Ed. 2d 274 (1969)(Reversible error where the record does

not disclose that the defendant voluntarily and understandingly entered his pleas of guilty).

Although a defendant can stipulate to a transfer of jurisdiction from youth court to district court, no such legal stipulation occurred in this case because Levi never expressly agreed to such a transfer.[5] Here, no written stipulation exists and nowhere in the record did Levi expressly consent to the transfer. Neither the court, his attorney, nor the county attorney even addressed Levi during the time set forth for the transfer hearing.

Instead, at the time set aside for the transfer hearing, the prosecutor recited to the court that Levi was willing to stipulate that the court could make findings regarding the seriousness of the offense and the interest of community protection without a transfer hearing. After the prosecutor's explanation, Levi's attorney merely responded, "That's correct, your Honor." After Anciaux's affirmative response, the court immediately began to discuss whether counsel was prepared for an omnibus

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[5] C.f. State v. Spotted Blanket, 1998 MT 59, ¶4, 288 Mont. 126, ¶4, 955 P. 2d 1347, ¶4 (Completely contrast with Levi's situation, a stipulation to the transfer from youth court to district court was reduced to writing **and signed by Spotted Blanket** as well as his defense attorney. (Emphasis added). Moreover, the validity of Spotted Blanket is questionable since it was decided prior to this Court's decisions in Bird, Tapson, and Finley, in which this Court has now held that before a defendant can waive a fundamental right, the waiver must be on-the-record with proof that the defendant knowingly, intelligently, and voluntarily waived his rights.

hearing. 5/12/99 Hrg. p. 3. The court never even addressed Levi throughout the entire proceeding. Instead, based only on the prosecutor's assertions, and Anciaux's affirmative response, the court transferred Levi's case from youth court into district court. The court took no steps to ascertain whether Levi had made an intelligent and voluntary waiver of his right to a transfer hearing. No written waiver had been submitted. In fact, the court never even provided Levi with an opportunity to speak at any point in the proceedings.

The May 12, 1999 transfer hearing was the most critical proceeding in Levi's case, affecting Levi's liberty interests for the rest of his life. Yet the court never even acknowledged Levi during the proceeding. Levi had a fundamental constitutional right to a transfer hearing. Waiver of such a critical hearing could not be satisfied by a mere affirmative response by Anciaux. Absent an express waiver by Levi, the court had no jurisdiction to remove Levi's case from youth court into district court. Levi's conviction in district court must be vacated and the matter remanded to youth court for a transfer hearing.

B. The district court did not have statutory authority to impose an additional twenty-five-year suspended sentence onto Levi's sentence.

At his re-sentencing hearing on June 25, 2003, the court sentenced Levi to five years to the Department of Corrections on each offense, to run consecutively and

declared him ineligible for parole for the entire sentence. Additionally, the court sentenced Levi to an additional 25-year suspended sentence on Count III, the accountability for deliberate homicide charge. The court lacked statutory authority to impose the additional 25-year suspended sentence.

1. Standard of review.

This Court will only review criminal sentences for legality. State v. Montoya, 1999 MT 180, ¶15, 295 Mont. 288, ¶15, 983 P.2d 937, ¶15. A district court has no power to impose a sentence in the absence of specific statutory authority. State v. Ringewold, 2001 MT 185, ¶21, 306 Mont. 229, ¶21, 32 P.3d 729, ¶21. Levi's sentence is illegal because it exceeded the statutory maximum term for a commitment to the Department of Corrections (DOC).

2. This Court may consider the illegality of Levi's sentence.

Although Levi's attorney did not orally object to the 25-year suspended sentence at the re-sentencing hearing, within days, and before the court had issued the written judgment, she filed a motion to amend sentence. In this motion, Levi's attorney argued that the court did not have statutory authority to impose the suspended sentence after the court had already sentenced Levi to the maximum possible sentence.

Moreover, even without an oral objection, "the better rule [is] to allow an

appellate court to review any sentence imposed in a criminal case, if it is alleged that such sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing." State v. Lenihan, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979). See also, State v. Heath, 2004 MT 58, ¶47, 320 Mont. 211, ¶47, 89 P. 3d 947, ¶47 *citing* State v. Brister, 2002 MT 13, ¶16, 308 Mont. 154, ¶16, 41 P.3d 314, ¶16.

3. Since Levi's crime occurred in 1998, the applicable sentencing statute is § 46-18-201(1)(e), MCA (1997).

The crimes for which the state charged Levi were committed on November 21, 1998. This Court has held that "the law in effect *at the time of the commission of the crime controls* as to the possible sentence." State v. Finley, 276 Mont. 126, 147, 915 P. 2d 208, 221 (1996)(Emphasis in original) *citing* State v. Stevens, 273 Mont. 452, 455, 904 P. 2d 590, 592 (1995) (citing State v. Azure, 179 Mont. 281, 282, 587 P. 2d 1297, 1298 (1978)). Therefore, the 1997 sentencing statutes are applicable in this case.

4. The district court could not impose a commitment to the DOC for greater than five years.

Section 46-18-201(1)(e), MCA (1997), controls the length of the sentence in which the court could impose. Section 46-18-201(1)(e)(1997) stated:

(1) Whenever a person has been found guilty of an offense upon a

> verdict or a plea of guilty, the court may:
> ***
> (e) impose a county jail or state prison sentence, as provided in Title 45, for the offense or commit the defendant to the department of corrections **for a period not to exceed 5 years** for placement in an appropriate correctional facility or program;

(emphasis added). When interpreting statutes, this Court's role "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." State ex rel. Keyes v. Thirteenth Judicial District, 1998 MT 34, ¶15, 288 Mont. 27, ¶15, 955 P. 2d 639, ¶15 (Court considered the plain language of the accountability and felony murder statutes in determining whether the defendant was charged with a legitimate offense under Montana law). Here, the plain language of § 46-18-201(1)(e), MCA (1997) is clear and unambiguous. Pursuant to the statute, a district court may sentence an offender to the DOC for a period not to exceed five years.

In State v. Belgarde, Sup.Ct. No. 02-498, this Court addressed this exact issue. In Belgarde, the defendant, also sentenced pursuant to § 46-18-201(1)(e), MCA (1997), challenged his ten-year sentence to the Department of Corrections. The State of Montana conceded that the maximum commitment to the Department of Corrections was five years. Consequently, this Court entered an order striking his ten-year DOC commitment and imposing an amended five-year DOC commitment.

(A copy of the Attorney General's "Notice of Concession and a copy this Court's Order in State v. Belgarde is attached are attached to this brief as Exhibit E[6]). In State v. George, 2002 MT 300, ¶5, 313 Mont. 11, ¶5, 59 P.3d 1151, ¶5, this Court recognized the Sentence Review Board's amendment of an original sentence that was contrary to § 46-18-201(1)(e), MCA (1997). Thus, the Board amended the defendant's sentence from a ten-year commitment to the Department of Corrections with five years suspended to a five-year commitment to the Department of Corrections with none of the time suspended.

The same statutory interpretation limiting actual commitment to five years applies to Levi's case. The district court's imposition of an additional 25-year suspended sentence on Count III does not comply with the limitations in § 46-18-201(1)(e),MCA (1997). Therefore, this Court should strike this portion of Levi's amended judgment and commitment and impose a five-year DOC commitment for Count III.

VI. CONCLUSION

At the most critical court appearance of his life, Levi Daniels sat in silence while the prosecutor explained to the court that Levi intended to waive his right to a

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[6] These documents were attached to Levi's Second Amended Petition for Postconviction Relief as Exhibits D and E. See, DC 56.

transfer hearing. During the transfer hearing, nobody consulted with 16-year-old Levi regarding whether he understood the proceedings and the consequences of waiving his right to a transfer hearing. To the contrary, neither the court nor his attorney even acknowledged Levi during the entire proceeding. Without an on-the-record personal wavier of the transfer hearing by Levi, the court's transfer of Levi's case from youth court to district court was invalid. The district court never obtained subject matter jurisdiction over Levi, and all of the subsequent proceedings in district court were null and void. Levi's conviction in district court must be vacated and the matter remanded to youth court for a transfer hearing.

Even if this Court affirms the district court's denial of Levi's Petition for Postconviction Relief, the court sentenced Levi to an illegal sentence. The court sentenced Levi to the Department of Corrections. Pursuant to § 46-18-201(1)(e), MCA (1997), a sentence to the DOC cannot exceed five years. Therefore, this Court should amend the judgment on Count III to a five-year DOC commitment, with no additional suspended time.

Dated this 28th day of July 2004.

MONTANA APPELLATE DEFENDER OFFICE

By: Kristina Guest
Kristina Guest
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 03-647

THE STATE OF MONTANA,

Plaintiff and Respondent,

v.

LEVI DANIELS,

Defendant and Appellant.

APPENDIX

Exhibit A: May 12, 1999 Hearing Transcript

Exhibit B: Judgment and Commitment, October 21, 1999

Exhibit C: Findings of Fact, Conclusion of Law and Order, April 25, 2003

Exhibit D: Amended Judgment and Commitment, July 3, 2003

Exhibit E: Attorney General's "Notice of Concession and a copy this Court's Order in State v. Belgarde

IN THE DISTRICT COURT OF THE TWENTIETH
JUDICIAL DISTRICT OF THE STATE OF MONTANA
IN AND FOR THE COUNTY OF LAKE

CAUSE NUMBER DC-99-30

STATE OF MONTANA,

Plaintiff,

vs.

LEVI DANIELS,

Defendant.

COPY

REPORTER'S COMPRESSED TRANSCRIPT

JUN 24 1999

Taken at the Lake County Courthouse
Polson, Montana
Wednesday, May 12, 1999

Honorable C. B. McNeil, presiding

A P P E A R A N C E S

DEBORAH KIM CHRISTOPHER, Lake County Attorney, Lake County Courthouse, 106 Fourth Avenue East, Polson, Montana 59860
appearing on behalf of the Plaintiff.

BENJAMIN R. ANCIAUX, ESQ., of the Anciaux Law Firm, 107 Sixth Avenue East, Polson, Montana 59860
appearing on behalf of the Defendant.

EXHIBIT
A

Reported by Barbara J. Marshall, Professional Shorthand Reporter for the State of Montana, residing in Polson, Montana.

MORNING SESSION, WEDNESDAY, MAY 12, 1999

(Whereupon, court was in session, with all parties including the defendant present, and the following proceeding was had:)

THE COURT: The next matter on the criminal calendar is State of Montana versus Levi Daniels, DC-99-30.

Let the record reflect the defendant is personally present with his attorney Ben Anciaux. The State is represented by the county attorney Kim Christopher.

The calendar indicates the matter is before the Court for omnibus hearing and a motion to find probable cause.

MS. CHRISTOPHER: Your Honor, actually the Court had already found probable cause with regard to an affidavit. We had done a request for and notice of a hearing with regard to the other elements for which there had not been a finding. This was pursuant to the case that just recently came down from the Supreme Court in the State versus James R. Butler.

In that case -- it was another one of those cases where this youth was transferred from youth court to district court without a hearing where the Court made findings on the probable cause and then on the other two

issues, which are the seriousness of the offense and the interest of the community protection.

And so, to avoid finding ourselves in the same situation as Butler, then I requested that we have a hearing wherein the Court could make the findings issue, take notice of the affidavit of probable cause, along with making the findings as to whether there was the seriousness of the offense and the interest of the community then justified the fact that the case would be transferred to district court.

It's my understanding, in conversation with defense counsel, that, rather than go through that hearing, the defendant would be stipulating that the Court could make those findings.

MR. ANCIAUX: That's correct, your Honor.

THE COURT: So ordered.

MS. CHRISTOPHER: Your Honor, if the Court wishes then, we'll prepare an order indicating those findings so that we have the file complete with regard to that issue.

THE COURT: You may do so. Are the parties then prepared to proceed to the omnibus hearing?

MR. ANCIAUX: The defendant is not, your Honor. I received a bundle of paperwork yesterday. I haven't even had a chance to go through that. And I'm

having some trouble talking to the various defense witnesses. So we're going to try to coordinate through tribal police to make that more available to me. I would request an additional three weeks and hopefully I can get it done within that period of time.

THE COURT: The defendant's request is granted. The omnibus hearing is continued to June 2d at 9:00 a.m.

MS. CHRISTOPHER: Thank you, your Honor.

MR. ANCIAUX: Thank you, your Honor.

THE COURT: You're welcome.

(Whereupon, the proceeding was concluded this 12th day of May, 1999.)

C. B. McNeil
District Judge
Lake County Courthouse
106 Fourth Avenue East
Polson, MT 59860-2171
Telephone: (406) 883-7250

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

THE STATE OF MONTANA,	*	
	*	
Plaintiff,	*	CAUSE NO. DC-99-30 (38)
	*	
vs.	*	JUDGMENT AND COMMITMENT
	*	
LEVI DANIELS,	*	
	*	
Defendant.	*	
	*	

* * * * * * * * * * * * * * * * * *

The Defendant, LEVI DANIELS, having come convicted in this Court by entry of a plea of guilty to the offenses of BURGLARY, a Felony, Count I, as specified in MCA 45-6-204(1), ACCOUNTABILITY - DELIBERATE HOMICIDE, a Felony, Count III, as specified in MCA 45-5-102(1)(a), and CRIMINAL MISCHIEF, a Felony, Count V, as specified in MCA 45-6-101(1)(a), committed in the County of Lake, State of Montana, IT IS ADJUDGED AND DECREED that the Defendant is guilty of the offenses charged.

IT IS HEREBY ORDERED that the offenses of THEFT, a Misdemeanor, Count II, as specified in MCA 45-6-301(1)(a), and USE OF VIOLENCE TO COERCE GANG MEMBERSHIP, a Felony, Count IV, as specified in MCA 45-8-403(2), are dismissed.

IT IS FURTHER ORDERED that the Defendant be punished by commitment to the Department of Corrections for a period of fifteen (15) years on Count I, forty (40) years on Count III, and ten (10) years on Count V. The sentences imposed on Counts I and V shall run concurrently with the sentence imposed on Count III. The Defendant shall receive credit for time served on these offense, which as of the date of this Judgment totals two hundred twenty-three (223) days.

THE COURT RECOMMENDS the Montana State Prison for the Defendant's commitment to the Department of Corrections.

THE COURT ORDERS that the Defendant shall not be eligible for parole until he has served at least twenty (20) years.

THE COURT STATES ITS REASON for this restriction is that the Defendant admitted to accountability for deliberate homicide, he provided the weapon used in the premeditated assassination of the victim, and has expressed no remorse.

THE COURT RECOMMENDS in the event the Defendant is released on parole, that the conditions as set forth below shall continue:

1. The Defendant shall be placed under the jurisdiction of the Department of Corrections and he shall comply with all of the rules and conditions established by said Department.

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olson, Montana 59860

CR-2018-203

2. The Defendant shall not change his place of residence without first obtaining permission from his Parole Officer.

3. The Defendant shall not leave his assigned district without first obtaining written permission from his Parole Officer.

4. The Defendant shall maintain employment or a program approved by his Parole Officer. The Defendant shall obtain permission from his Parole Officer prior to any change of employment.

5. The Defendant shall personally report to his Parole Officer as directed and shall submit written monthly reports on forms provided.

6. The Defendant shall not own, possess, or be in control of any firearms or deadly weapons, including black powder.

7. The Defendant shall obtain permission from his Parole Officer before financing a vehicle, purchasing property, or engaging in a business.

8. The Defendant shall submit to search of his person, vehicle, or place of residence, at any time of the day or night without warrant, at the request of the Department, upon reasonable cause as ascertained by his Parole Officer.

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Courthouse
ason, Montana 59860

9. The Defendant shall comply with all municipal, county, state and federal laws. The Defendant is to report all contact with law enforcement officials to his Parole Officer within seventy-two (72) hours of the occurrence.

10. The Defendant is prohibited from drinking or possessing alcoholic beverages and from entering such places where the sale of alcohol is the principal business.

11. The Defendant shall not use or possess any drugs, unless they are prescribed to him by a licensed physician.

12. The Defendant shall submit to random and frequent blood, breath, or urine tests, without warrant, at the request of the Parole Department, upon reasonable cause.

13. The Defendant shall participate in any alcohol and/or drug and/or mental health counseling and/or treatment as deemed advisable by the Department, including inpatient treatment.

14. The Defendant shall obtain a chemical dependency evaluation or assessment at his own expense and participate in counseling as directed.

15. The Defendant shall obtain a mental health evaluation at his own expense and participate in counseling as directed.

///

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Lake County
Courthouse
Polson, Montana 59860

02-04-36.5

16. The Defendant shall have no contact with the victim's family.

17. The Defendant shall be responsible for restitution to the Crime Victim's Unit in the amount of TWO THOUSAND FORTY-NINE AND 48/100THS DOLLARS ($2,049.48).

18. The Defendant shall pay the mandatory surcharge of TWENTY DOLLARS ($20.00) on Count I, TWENTY DOLLARS ($20.00) on Count III, and TWENTY DOLLARS ($20.00) on Count V.

19. The Defendant shall pay the Court technology fee of FIVE DOLLARS ($5.00) on Count I, FIVE DOLLARS ($5.00) on Count III, and FIVE DOLLARS ($5.00) on Count V.

20. The Defendant shall reimburse the court for the services of the public defender in the amount of ONE HUNDRED DOLLARS ($100.00).

21. The restitution, surcharges, court technology fees, and services of the public defender shall be paid to the Clerk of the District Court on a schedule as determined by his parole officer and shall be paid in full at least six (6) months prior to the Defendant's discharge from parole.

22. The Defendant shall pay the mandated supervisory fee of ONE HUNDRED TWENTY DOLLARS ($120.00) per year, prorated at TEN DOLLARS ($10.00) per month, for the number of months under supervision, which shall be paid to the Clerk of the District Court.

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Courthouse
on, Montana 59860

THE COURT FURTHER ORDERS that pursuant to §46-23-504 MCA, the Defendant shall immediately register with the Department of Corrections as a violent offender; and pursuant to §46-23-505 MCA, the Defendant shall provide written notice to the Lake County Sheriff's Office or Department of Corrections of any change in residence.

THE COURT FURTHER ORDERS pursuant to §44-6-103 MCA, the Defendant shall provide a biological sample for DNA analysis to determine identification characteristics specific to the Defendant. The Department of Corrections shall be responsible for taking the sample and submitting said sample to the Division of Forensic Science.

THE COURT STATES its reasons for said sentence are that it provides punishment to the Defendant, it takes into consideration the facts contained in the pre-sentence investigation, it takes into consideration the age and absence of prior criminal record of the Defendant, it affords the Defendant an opportunity for rehabilitation, and long term supervision.

DATED this 20th day of October, 1999.

SIGNED this 21st day of October, 1999.

C.B. McNeil

JUDGE OF THE DISTRICT COURT
C.B. McNeil, Presiding

LAKE COUNTY
ATTORNEY'S OFFICE
Lake County
Courthouse
Polson, Montana 59860

Hon. C.B. McNeil
District Judge
Lake County Courthouse
106 Fourth Avenue East
Polson, MT 59860
(406) 883-7250

APR 2 9 2003

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

SATE OF MONTANA,

Plaintiff,

vs.

LEVI DANIELS,

Defendant.

Cause No. DC-99-30

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above cause came before the Court upon Defendant's Second Amended Petition for Postconviction Relief, filed December 6, 2002; supported by brief, and the Court having considered the State's answer brief filed February 10, 2003, and the Defendant's reply brief, filed February 27, 2003, and good cause appearing therefore, enters the following:

FINDINGS OF FACT

1. That on March 10, 1999, the Defendant was charged in District Court with the offenses of Burglary, Theft, Deliberate Homicide, and Use of Violence to Coerce Gang Membership. The charges were later amended to add a charge of Criminal Mischief. Public Defender Benjamin Anciaux was appointed to represent the Defendant.

2. That on April 16, 1999, following the Montana Supreme Court decision in State v. Butler, 977 P.2d 1000 (1999), the State requested a transfer hearing. The hearing was scheduled for May 12, 1999.

EXHIBIT C

3. That the Defendant and his attorney appeared before the Court at the transfer hearing on May 12, 1999. Counsel for the Defendant stipulated in open court, and in the presence of his client, that the case was properly filed in district court.

4. That trial was set for September 9, 1999.

5. That on September 1, 1999, the Defendant changed his plea from not guilty to guilty on Counts I, III, and V of the Second Amended Information. At the time the Defendant changed his plea, the jury had been called. Prior to accepting the Defendant's guilty pleas, the Court informed the Defendant that, pursuant to the Court's policy, the Court was not bound by the recommended sentence.

6. That the Defendant appeared for sentencing on October 20, 1999. Both the State and the Defendant recommended sentences totaling forty years commitment to the Department of Corrections. The Court sentenced the Defendant to forty years commitment to the Department of Corrections and imposed the restriction that the Defendant not be eligible for parole for twenty years.

7. That the Defendant does not challenge the voluntariness of his plea.

Based on the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. That the requirement of a transfer hearing was satisfied when the Defendant's attorney, in the presence of the Defendant and in open court, stipulated to the necessary findings. The Defendant cites State v. Tapson, 41 P.3d 305 (2001), for the proposition that a Defendant can only waive a fundamental right by making a personal waiver on the record. That rule was limited to the specific circumstances that occurred in that case. Tapson, 41 P.3d at 312. The Court notes that the current version of the transfer statute, Sec. 41-5-206 MCA (2001), specifically allows the youth's counsel to waive such hearing in writing or on the record.

2. That pursuant to Sec. 46-18-201(1), MCA, the Court had authority to suspend execution of sentence for a period up to the maximum sentence allowed, commit the Defendant to the Department of Corrections for a maximum of five years, or impose any combination thereof.

3. That Sec. 46-18-401(4), MCA, requires that sentences for separate offenses run consecutively unless otherwise ordered by the Court.

4. That the sentence recommended by both the State and the Defendant, and imposed by the Court, exceeds the maximum punishment allowed by law at the time the Defendant was sentenced.

Based on the foregoing Findings of Fact and Conclusions of Law, the Court enters the following:

ORDER

The Defendant's motion to vacate convictions and remand the matter for a transfer hearing is denied.

The sentence previously imposed is vacated. The cause is set for resentencing June 4, 2003 at 9:00 a.m.

DATED this 25th day of April, 2003.

C. B. McNEIL

C.B. McNeil
District Judge

pc: Mitchell A. Young, Deputy Lake County Attorney
Kristina Guest, Assistant Appellate Defender
4/28/03 - vs

JUL 15 2003

C. B. McNeil
District Judge
Lake County Courthouse
106 Fourth Avenue East
Polson, MT 59860-2171

MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

THE STATE OF MONTANA,	*	
	*	
Plaintiff,	*	CAUSE NO. DC-99-30
	*	
vs.	*	AMENDED JUDGMENT AND COMMITMENT
	*	
LEVI DANIELS,	*	
	*	
Defendant.	*	
	*	

* * * * * * * * * * * * * * * * * * *

The Defendant, LEVI DANIELS, was brought back to this Court for re-sentencing pursuant to this Court's Findings of Fact, Conclusions of Law and Order issued April 25, 2003. The Defendant was convicted in this Court by plea of guilty to the offenses of BURGLARY, a Felony, Count I, as specified in MCA 45-6-204(1), ACCOUNTABILITY - DELIBERATE HOMICIDE, a Felony, Count III, as specified in MCA 45-5-102(1)(a), and CRIMINAL MISCHIEF, a Felony, Count V, as specified in MCA 45-6-101(1)(a), committed in the County of Lake, State of Montana, and was sentenced on October 20, 1999.

THE COURT ORDERS that the Defendant shall be punished by commitment to the Department of Corrections for a period of

five (5) years on Count I, five (5) years on Count III, with an additional twenty-five (25) years suspended, and five (5) years on Count V. The sentences imposed on Counts III and V shall run consecutive to each other and consecutive to Count I for a total of fifteen (15) years with an additional twenty-five (25) years suspended.

The Court orders that the Defendant shall be ineligible for parole during the first fifteen (15) years of his commitment to the Department of Corrections for the reasons set forth in this Court's Judgment of October 20, 1999, which were that the Defendant admitted to accountability for deliberate homicide, he provided the weapon used in the premeditated assassination of the victim, and he has expressed no remorse.

The Defendant receive credit for time served on these offenses since his arrest on March 11, 1999.

THE COURT FURTHER ORDERS that the suspended portion of the sentence shall be upon the following conditions:

1. The Defendant shall be under the supervision of the Department of Corrections, subject to all rules and regulations of the Adult Probation and Parole Bureau.

2. The Defendant shall not change his place of residence without first obtaining permission from his Probation Officer.

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3. The Defendant shall not leave his assigned district without first obtaining written permission from his Probation Officer.

4. The Defendant shall maintain employment or a program approved by his Probation Officer. The Defendant shall obtain permission from his Probation Officer prior to any change of employment.

5. The Defendant shall personally report to his Probation Officer as directed and shall submit written monthly reports on forms provided.

6. The Defendant shall not own, possess, or be in control of any firearms or deadly weapons, including black powder.

7. The Defendant shall obtain permission from his Probation Officer before financing a vehicle, purchasing property or engaging in business.

8. The Defendant shall submit to a search of his person, vehicle, or place of residence, at any time of the day or night without warrant, at the request of the Department, upon reasonable cause as ascertained by his Probation Officer.

9. The Defendant shall comply with all city, county, state and federal laws and ordinances and conduct himself as a good citizen. The Defendant shall report any

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arrests or contacts with law enforcement to his Probation Officer within seventy-two (72) hours.

10. The Defendant is prohibited from drinking or possessing alcoholic beverages and from entering such places where the sale of alcohol is the principal business.

11. The Defendant shall not use or possess illegal drugs unless they are prescribed to him by a licensed physician.

12. The Defendant shall submit to random and frequent blood, breath or urine tests, without warrant, at the request of the Probation Department, upon reasonable cause.

13. The Defendant shall participate in any alcohol and/or drug and/or mental health counseling and/or treatment as deemed advisable by the Department, including inpatient treatment.

14. The Defendant shall obtain a chemical dependency evaluation or assessment at his own expense and participate in counseling as directed.

15. The Defendant shall obtain a mental health evaluation or assessment at his own expense and participate in counseling as directed.

16. The Defendant shall have no contact with the victim's family.

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Polson, Montana 59860

17. The Defendant shall be responsible for restitution to the Crime Victim's Unit in the amount of TWO THOUSAND FORTY-NINE AND 48/100THS DOLLARS ($2,049.48).

18. The Defendant shall pay the mandatory surcharge of TWENTY DOLLARS ($20.00) on Count I, TWENTY DOLLARS ($20.00) ON Count III, and TWENTY DOLLARS ($20.00) on Count V.

19. The Defendant shall pay the Court technology fee of FIVE DOLLARS ($5.00) on Count I, FIVE DOLLARS ($5.00) on Count III, and FIVE DOLLARS ($5.00) on Count V.

20. The Defendant shall reimburse the court for the services of the public defender in the amount of ONE HUNDRED DOLLARS ($100.00).

21. The restitution, surcharges, court technology fees, and services of the public defender shall be paid to the Clerk of the District Court on a schedule as determined by the Probation Department and shall be paid in full at least six (6) months prior to the Defendant's discharge from probation.

22. The Defendant shall pay the mandated supervisory fee of ONE HUNDRED TWENTY DOLLARS ($120.00) per year, prorated at TEN DOLLARS ($10.00) per month, for the number of months under supervision, payable to the Clerk of the District Court.

THE COURT FURTHER ORDERS that pursuant to §46-23-504 MCA, the Defendant shall immediately register with the Department of Corrections as a violent offender; and pursuant to

LAKE COUNTY
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Lake County
Courthouse
Polson, Montana 59860

§46-23-505 MCA, the Defendant shall provide written notice to the Lake County Sheriff's Office or Department of Corrections of any change in residence.

THE COURT FURTHER ORDERS pursuant to §44-6-103 MCA, the Defendant shall provide a blood sample for DNA analysis to determine identification characteristics specific to the Defendant. The Department of Corrections shall be responsible for taking the sample and submitting said sample to the Division of Forensic Science.

THE COURT STATES its reasons for said sentence are it provides punishment to the Defendant it takes into consideration the facts contained in the pre-sentence investigation, it takes into consideration the age and absence of prior criminal record of the Defendant, it affords the Defendant an opportunity for rehabilitation, and long term supervision.

If either party believes that the written Judgment filed herein does not conform to the oral pronouncement of this Court at the time of sentencing, either the Defendant or the State may request a hearing to modify the written, filed Judgment. **This request must be made by either the State or the Defendant within 120 days of the filing of the written Judgment.** In the event such a request is made, a hearing will be held to consider the motion at which the Defendant must be present unless Defendant waives the right to be present. If no request

LAKE COUNTY
ATTORNEY'S OFFICE
Lake County
Courthouse
Polson, Montana 59860

for modification is filed by either the State or the Defendant within 120 days, the right to a modification hearing shall be waived.

DATED this 25th day of June, 2003.

SIGNED this 3rd day of July, 2003.

/S/ C.B. McNEIL

JUDGE OF THE DISTRICT COURT
C.B. McNeil, Presiding

LAKE COUNTY
ATTORNEY'S OFFICE
Lake County
Courthouse
Polson Montana 59860

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 02-498

HERMAN D. BELGARDE,

Appellant,

v.

STATE OF MONTANA,

Respondent.

NOTICE OF CONCESSION

The State hereby concedes that Herman Belgarde is entitled to have his sentence amended to comply with Mont. Code Ann. § 46-18-201 (1997). This Court should enter an order to that effect based on the following considerations.

BACKGROUND AND DISCUSSION

Belgarde committed several felonies in August 1997. He was sentenced on those offenses in October 1997, and the district court committed him to the Department of Corrections (DOC) for ten years on each count, to run concurrently.

In the 1997 session, the Montana Legislature passed House Bill 125, which amended several sentencing provisions. Chapter 322, section 1 of that bill required that a DOC commitment not exceed five years. The temporary provisions were effective upon passage and approval (April 21, 1997), and the final version of Mont. Code Ann. § 46-18-201(1)(e) (1997), went into effect on July 1, 1997. This all occurred prior to Belgarde's offenses and prior to his sentencing. In other words, he should have been sentenced under the new

EXHIBIT E

law, Mont. Code Ann. § 46-18-201(1)(e) (1997), which limited a DOC commitment to no more than five years.

The State concedes that Belgarde is entitled to have the sentence amended in Cause No. BDC 97-338. Accordingly, this Court should strike the ten-year DOC commitment and, pursuant to Mont. Code Ann. § 46-18-201 (1997), order that the DOC commitment be for a period of five years.

Respectfully submitted this 29th day of October, 2002.

MIKE McGRATH
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
JENNIFER ANDERS
Assistant Attorney General

///

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 02-546

HERMAN D. BELGARDE,

Appellant,

v.

STATE OF MONTANA,

Respondent.

ORDER

The Appellant, Herman D. Belgarde (Belgarde), appearing *pro se*, has appealed from the District Court's denial of his Petition for Postconviction Relief. Belgarde sought releif in the District Court pursuant to § 46-18-201(3)(d)(i), MCA (1997), which went into effect on July 1, 1997, and which requires that a Department of Corrections (DOC) commitment not exceed five years. Belgarde was sentenced in August of 1997, and committed by the District Court to the DOC for a period of ten years on multiple counts, to run concurrently. Belgarde now seeks relief from his sentence, claiming that he is entitled to the benefit of the July 1997 amendments to the foregoing statute, and that, if the statute is appropriately applied, his continued incarceration is illegal.

The State has filed a Notice of Concession. The State concedes that Belgarde is entitled to have the sentence imposed upon him in Cause No. BDC-97-338 amended. The State asks this Court to strike the ten-year DOC commitment, pursuant to § 46-18-201, MCA (1997), and order that the DOC commitment be for a period of five years. Pursuant to the

State's Notice of Concession, and good cause appearing,

IT IS HEREBY ORDERED that the ten-year DOC commitment imposed against Belgarde in Cause No. BDC-97-338, Cascade County, is STRICKEN, and, in its place, an amended sentence of committment to DOC for a period of five years is substituted.

IT IS FURTHER ORDERED that the Clerk of this Court give notice of this Order by mail to the Montana Eighth Judicial District Court, to Herman D. Belgarde, at his last known address, and to all counsel of record.

DATED this 7th day of November, 2002.

Chief Justice

Justices

November 7, 2002

CERTIFICATE OF SERVICE

I hereby certify that the attached document was sent by United States mail, prepaid, to the following named:

HERMAN D BELGARDE –
CROSSROADS CORRECTIONS CTR
PO BOX 916
SHELBY MT 59474-0916

HON MIKE MCGRATH –
ATTORNEY GENERAL
PO BOX 201401
HELENA MT 59620-1401

BRANT LIGHT –
CASCADE CO ATTY
121 4TH ST N
GREAT FALLS MT 59401

Nancy Morton
Clerk of D.C.
Cascade Co. Courthouse
Great Falls MT 59401

ED SMITH
CLERK OF THE SUPREME COURT

STATE OF MONTANA

BY: D. Gallagher
Deputy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing APPELLANT'S BRIEF was served on counsel of record by depositing a true and correct copy in the U.S. mail, postage prepaid, on the 28th day of July 2004, and addressed as follows:

Mike McGrath
Attorney General
Dept. Justice
P.O. Box 201401
Helena, MT 59620-1401

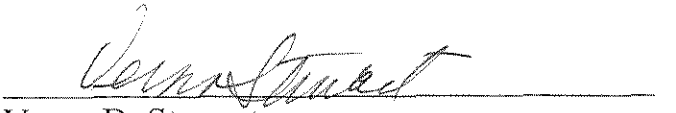
Robert J. Long
Lake County Attorney
106 4th Avenue East
Polson, MT 59860-2125

Verna D. Stewart

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief of Defendant and Appellant is printed with a proportionately spaced Times New Roman non-script text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and the word count calculated by WordPerfect 9.0 for Windows, in addition to a manual count of the words contained in footnotes, totals 5,042 words, excluding table of contents, table of authorities, appendix, certificate of service and certificate of compliance.

Dated this 28th day of July 2004.



Verna D. Stewart